Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

JO MINOR,

Petitioner,

v.

PRUDENTIAL SECURITIES, INC. and PATRICE MACKIE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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44 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Arbitration Act - which provides that "the United States court in and for the district wherein the award was made may make an order vacating the award" -- means instead that the United States court may *only* make such an order in diversity cases and never in arbitrations resolving federal questions -- a distinction found nowhere in any language or policy of the enactment and contrary to its specific import?

2. Whether when Congress enacted the Federal Arbitration Act in 1925 it intended -- by uniform language granting the "United States courts" jurisdiction to enforce and review arbitrations -- to instead only grant federal courts power in federal question cases to *compel* arbitration and deny them power to *review* those same cases after arbitration, while simultaneously in diversity cases granting the federal courts power both to compel *and review* arbitrations? Does the Seventh Circuit's holding to this effect conflict with other Circuits and sow utter confusion?

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

The caption of the case in this court contains the names of all the parties to this proceeding.

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OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1A)[1] is presently unreported, as is the opinion by the district court (App. 9A).

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1996 (App. 1A). No petition for rehearing was filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1)(1994).

STATUTE INVOLVED

The statute involved here is Section 10(a) of the Federal Arbitration Act ("the Act"), and related sections, 9 U.S.C. 1 et seq. Section 10(a) is set forth below and the entirety of the Act is set forth in the Appendix at App.17A .

Section 10(a):

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or

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[1] References to "App." are to the Appendix submitted with this petition.

in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Petitioner, a widow in her seventies and brokerage customer of defendant Prudential Securities, Inc. ("Prudential") and its retail broker defendant Mackie ("Mackie"), filed a complaint alleging several unauthorized trades in her account, as well as misleading statements as to safety and security causing her to invest in speculative stocks which promptly crashed. In support of these claims, she alleged a pattern of falsity including the actual forgery of her signature on one of the defendants' customer agreements, and she offered the unimpeached testimony of a highly regarded handwriting expert to that effect.

Because of a standard clause in one of her brokerage agreement forms, she was forced to file her complaint as an NASD arbitration instead of in federal court in Chicago, where (because of the existence of claims under Section 10(b) of the Securities Exchange Act of 1934 and RICO) it would otherwise have been filed.

As set out in her Motion to Vacate Arbitration Award, the dismissal of which for lack of federal subject matter jurisdiction is the issue in this petition, instead of defending on the merits, defendants chose to try this case by creating false testimony, particularly concerning the forgery. First they engaged a highly regarded handwriting expert, falsely submitting to him as "unknown" exemplars key documents known by them to have

been written by defendant Mackie. When this expert nonetheless pointed his finger at them, defendants "disappeared" this expert and, using the subterfuge of hiring a co-counsel for defendant Mackie, employed on the day before trial a former Chicago patrolman as their expert. This gentleman testified falsely that the documents he examined could not conclusively show Mackie as the forger (neglecting to inform the panel that he excluded the incriminating documents from what he was showing them). This perjured testimony resulted directly in the adverse award and was cited by the panel as what it relied upon.

Plaintiff's position is straightforward. She has compelling federal claims which she was forced to arbitrate and which were given short shrift in a proceeding corrupted by defendants. Section 10 of the Act expressly provides for redress by motion to the "United States court" for the district of the award. She did this, and was turned away on the specious theory that the Act provides no federal subject matter jurisdiction regarding her underlying federal claims, although if hers were a diversity case such jurisdiction would lie. Nothing in the language or history of the Act supports this distinction, or this refusal by a federal court to vindicate the federal interest in her underlying federal claims or to protect her from the corruption of legal process this case reveals.

SUMMARY OF ARGUMENT

When Congress enacted the Federal Arbitration Act in 1925, it spoke expressly and exclusively of the power of "the United States court" to enforce arbitrations, and to confirm, vacate or modify awards. Until this Court so held in 1983, it was unclear whether the Act applied at all in the state courts, or whether (given the question whether the Act applied to the states) state rules inconsistent with the Act were valid. In then resolving these questions, this Court also indicated in a footnote that the Act's express and exclusive references to "the United States courts" did

not provide a basis for federal jurisdiction where such jurisdiction would not otherwise exist:

> "The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create an independent federal-question jurisdiction under 28 U.S.C. 1331 or otherwise."

Moses H. Cone Hospital v. Mercury Construction Co., 460 U.S. 1, 25 n.32 (1983).

This mandate to inquire whether federal jurisdiction would otherwise exist to support federal court enforcement or review of arbitrations is at the heart of this appeal. How do you tell whether federal jurisdiction otherwise would exist?

Respondents argued, and the district and 7th Circuit held, that, when it comes to confirming, vacating or modifying awards, the court can only look at the actual motion to vacate to see if it raises an independent federal question, and cannot look at the underlying complaint in arbitration, although examining the underlying complaint is exactly what the court must do under the Act when asked (1) to enforce arbitration in the initial instance (Act, at sec. 3, 4, 8), and also (2) to stay confirmation pending a motion to vacate or modify (Act, at sec. 12). What appears to have induced this anomalous result was a misinformed analogy to the "well-pleaded complaint" rule, which has no application under the motion procedure set up in the Act (Act, sec. 6, 12; F.R.Civ.P. 81(a)(3)) or the sensible, harmonious construction of its various parts. Indeed, proper application of the "well-pleaded complaint" rule would lead to the opposite result because in removal cases the "well-pleaded complaint" rule looks not to the removal petition (the analogy to the motion to vacate or confirm here) but to the underlying claim filed in state court to see if it supports jurisdiction in the federal court.

The Seventh Circuit's approach conflicts with the construction of the Act by the Sixth Circuit and creates, without warrant in the Act or anything in the United States Code or Federal Rules, a confused hodge-podge of jurisdictional traps and differences under varying provisions of the Act which it is simply inconceivable that Congress in 1925 could possibly have considered, or considered proper. How can a federal statute which for forty years was not even applied or considered applicable in state courts now be construed (contrary to its express language and obvious implication) to exclude from federal court and relegate to state courts all federal question cases - the very cases which motivated Congress to enact the Act in the first place and in which the federal interest under the Act is paramount?

Petitioner asks for her day in court, in the "United States court" for the district of the award, to vindicate the federal interest in the federal claims violated and subverted by respondents' corruption of her hearing.

ARGUMENT

I. The Seventh Circuit's View that the Act's language "the United States court may make an order" really means "the United States court may *not* make an order" is based upon clear error of logic, language and history.

Any laymen would be bemused at the stark reversal of language and logic displayed by the Seventh Circuit here; only a lawyer, they say, can turn a direct statement into its opposite. It is sophistry of this sort which lowers the public esteem of the profession and courts and which this Court should correct here.

The argument that the federal courts lack subject matter jurisdiction over arbitrated federal claims not only defies language, it defies logic. Such a view assumes that Congress, in passing the FAA, decided to distinguish between (and

discriminate against) those claimants asserting the violation of *federal* rights, who will *not* be given a federal forum, and those claimants asserting *state* claims but who happen to be of diverse citizenship, who *will*. On the face of it, this appears to be an absurd and unlikely proposition. Especially so because the Act speaks only of the "United States courts" and if those courts lack jurisdiction over a large class of cases, to what courts were those cases intended to go? Presumably nowhere. But Congress can not be presumed to have enacted such a nullity.

Instead, demonstration of Congressional intent to so reverse the normal assumption that federal courts exist to vindicate and protect federal interests should be quite convincing, and its existence not presumed as it was by the courts below. As one authority explains, "federal question jurisdiction was one of the principal reasons that the Constitution authorized Congress to create a system of inferior federal courts." Wright, Miller & Cooper, *13B Federal Practice and Procedure*, Section 3561, p.2 (2d ed. 1984).

A. The Provisions of the Act show a harmonious and unified concept of federal jurisdiction contrary to the interpretation below.

Sections 3, 4, and 8 of the Act set out how to find whether federal jurisdiction exists regarding arbitration issues. The concept is simple, consistent with removal and "well-pleaded complaint" standards, and express: *"save for"* the arbitration agreement would the federal court have jurisdiction over the case.[2] These sections deal with *pre-arbitration* orders enforcing

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[2] Section 3 of the Act assumes federal jurisdiction because it provides power to the federal district court to stay a case already before it. Section 4 allows any federal district court to order arbitration wherever "save for such agreement [to arbitrate] [it] would have jurisdiction". Section 7 provides for subpoenas and

(continued...)

the parties' contract. This design leaves the review of most arbitrations to state court. The federal courts are involved only where they would otherwise be involved without the agreement to arbitrate. The FAA has achieved its principal intent - to validate arbitration agreements without otherwise disturbing the structure of the laws. 9 U.S.C. Sect. 2; *Allied-Bruce Terminix Cos v. Dobson*, 513 U.S. __, 130 L.Ed 2d 753, 762, 767, 115 S.Ct ___ (1995)("the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate.").

Sections 9, 10, 11 and 12 address the question of what the courts do *after* the arbitration has resulted in an award. They do not contain the express "save for" language found in Section 4 and 8 and inherent in Section 3, speaking instead just in terms of the power of "the United States court". But unless something in the language of the FAA or its legislative history reveals an intention to treat post-arbitration matters differently, the provisions of the Act should be read together, as the inference inevitably is that Congress intended a unitary, consistent approach under the Act. A hodge-podge of different, inconsistent rules, providing fertile ground for endless litigation and uncertainty, is not to be presumed.

2(...continued)
allows the district court to compel appearance and punish for contempt upon "petition". Section 8 allows proceedings to begin by seizure in admiralty cases, with the federal court retaining jurisdiction to enter its decree upon the award. Section 9 allows the parties to specify a court for enforcement of an award, or, in default thereof, to apply to the "United States court" for the district. Section 10 allows "the United States court" for the district to vacate awards upon specified grounds. Section 11 similarly allows for modifying or correction awards. Section 12 allows a court originally able to stay to permit arbitration to stay enforcement after award. See App. 17A .

Indeed, Section 12 of the Act, which also applies post-award, explicitly empowers the federal judge to stay confirmations of awards wherever he or she could have stayed pre-award proceedings under Sections 3, 4 and 8. This shows clearly that no distinction between pre-and post-award was intended, and that anything other than the simple, single standard which the Act's language, structure and logic suggests would render it hopelessly complex and a minefield of endless litigation - "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos v Dobson*, 513 U.S. , 115 S.Ct., 130 L.Ed.2d 753, 765 (1995).

B. The Sixth and Second Circuits follow the course rejected by the Seventh Circuit here.

The Sixth Circuit in *Ford v. Hamilton Investments*, 29 F.3d 255, 258 (1994), compared the various provisions of the Act and held that a single, harmonious interpretation was intended:

> Section 4 of the Federal Arbitration Act, which says that a party to an agreement to arbitrate may seek an enforcement order from a federal district court "which, save for such agreement, would have jurisdiction under title 28", obviously contemplates that "there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue." *Mercury Constr.*, 460 U.S. at 25 n.32, 103 S.Ct. at 942 n.32. Sections 9 and 10 of the Arbitration Act contemplate the same thing.

The Second Circuit in *Harry Hoffman Printing v. Graphic Com.*, 912 F.2d 608, 611 n.1 (1990), found the Act to present a unitary concept of federal subject matter jurisdiction, and that the approach taken by the Seventh Circuit would be wrong:

> [I]t would be anomalous to conclude, for example, that section 4 confers no jurisdiction to compel arbitration,

but that section 10 confers jurisdiction to vacate an award once arbitration has taken place.

Even the Seventh Circuit itself, in an earlier opinion by Judge Posner, rejected the approach taken below:

> "Although section 9 does not refer to any jurisdictional requirements for enforcing arbitration awards, other than the award itself, we may assume, following Wright and Miller, that the jurisdictional requirements for other proceedings under the Arbitration Act, see, e.g., 9 U.S.C. Section 4, are applicable to section 9 proceedings too. See 13B Wright, Miller & Cooper, *Federal Practice and Procedure* Section 3569, at pp. 171-72 (2d ed. 1984).

Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138, (7th Cir. 1985).

Thus there appears to be a split in the circuits on the approach to be taken. This Court should take this case and resolve the differences.[3]

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[3] The Fifth Circuit appears to have fallen into the same conceptual trap as the Seventh in *Prudential-Bache Securities v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992), in which the respondent here argued the opposite side from its position below, and lost. Although the Fifth Circuit also misapplied the "well-pleaded complaint" rule, in *Fitch* by the time the case was in federal court there was no longer any basis for federal jurisdiction "save for" the arbitration, since Prudential had failed to comply with the strict time limits for removal and had thus waived its claim to federal jurisdiction. Consistent with Petitioner's view, the *Fitch* court indicated that had this waiver not occurred, federal jurisdiction would have existed to compel arbitration.

C. The "Well-Pleaded Complaint" Rule Is Inapplicable or only Confirms Federal Jurisdiction Here.

The courts below reasoned that they lack subject matter jurisdiction here because the "well-pleaded complaint" rule requires them to only look at the initial paper filed in federal court to see if a federal question is raised in it or if diversity or admiralty requirements are met. Since it has been held that the exclusive grounds for review of arbitration set out in Section 10 of the Act do not themselves supply federal question jurisdiction (*Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983)), this approach means that in federal question cases the court finds no jurisdiction exists, while in diversity and admiralty cases it finds jurisdiction does exist, since in the latter cases the party can simply describe the relevant jurisdictional circumstances.

This approach is based upon a fundamental misunderstanding both of the structure of the Act and related Federal Rules of Civil Procedure, and of the true content of the "well-pleaded complaint" rule. The "well-pleaded complaint" rule has two aspects: (1) in judging the existence of federal jurisdiction for a normal civil action, the court does not look to the answer or anticipated defenses, but looks just to the complaint, and (2) the court disregards "surplusage" unnecessary for the statement of the claim. Wright, Miller & Cooper, 13B *Federal Practice & Procedure*, Section 3566 at pp. 83-84, 87 (2d ed. 1984).

First of all, although most other filings in federal court must be by "complaint" under Rule 3, F. R. Civ. P., review of arbitration is specially excepted. Rule 81 (a)(3) of the Federal Rules of Civil Procedure gives express deference to the procedural rules in the Act. The Act specifically states that the initial filing in court is a "motion", not a complaint, and provides for service as for any other motion. 9 U.S.C. Section 6, 12. This is to provide for an expedited procedure, and was clearly intended to make the procedure in court - whether to enforce arbitration in the initial instance or to confirm, vacate or modify

an award - a continuation of the underlying complaint in the arbitration proceeding. Thus to apply the "well-pleaded complaint" rule to this motion procedure is to misapply the doctrine from the start.

Secondly, where the question is whether a state complaint can be removed to federal court, a context analogous to review of arbitrations, the "well-pleaded complaint" rule requires the federal court to examine not the petition for removal, as respondents logic would suggest, but the underlying state complaint sought to be removed. See e.g., *Franchise Tax Board v. Laborers' Vac. Trust,* 463 U.S. 1 (1983). Just as with arbitrations, the relevant source for federal jurisdiction is the "complaint" not the motion used to bring that complaint before he court. The "well-pleaded complaint" rule, insofar as it applies at all, dictates the opposite result from that found below. Respondents and the courts below turn the law upside down.

D. The Plain Meaning of the Act Requires Reversal.

Finding a unitary concept of subject matter jurisdiction harmonizes the Act's various provisions and provides needed clarity. It also follows the ordinary meaning of the words in the statute, without creating arcane distinctions which become only expensive traps for the unwary, like the alternative adopted by the courts below would do. *Perrin v. United States*, 444 U.S. 37, 42 (1979)(words not defined in a statute should be given their ordinary and common meaning); *Smith v. United States*, 508 U.S. ,113 S.Ct. 2050, 124 L.Ed 2d 138(1993)(same). The question asked in all cases is whether, "save for the agreement", federal jurisdiction would lie. The Seventh Circuit's approach conflicts with that of other circuits, violates the language, logic and history of the Act, and creates only confusion for the practitioner.

II. Conclusion

For the above reasons, Petitioner requests this petition be granted, and the decision below reversed.

Respectfully Submitted,

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